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IN THE

Supreme Court of the United States

October Term, 1982

TERRACE WEST, INC.,
Petitioner,

against

THE CITY OF PLATTSBURGH, NEW YORK,
Respondent,

and

THE STATE OF NEW YORK,
Intervenor.

ON APPEAL FROM THE APPELLATE DIVISION, THIRD DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

Respondent-Intervenor's Brief in Opposition

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Question Presented.

Whether Articles 2 and 4 of the New York State Eminent Domain Procedure Law (EDPL), which provide that a condemnor shall conduct a public hearing to review the public use to be served by a proposed public project and for judicial review that such a determined public use will be served by the proposed acquisition, violate the Due Process Clause of the United States Constitution?

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Statement.

Petitioner asserts in its petition for a writ of certiorari that Articles 2 and 4 of the Eminent Domain Procedure Law are unconstitutional and denies it due process under the United States Constitution, Fourteenth Amendment. It contends that even though the condemnor, City of Plattsburgh, held a public hearing to inform the public and review the public use to be served by the property project pursuant to EDPL, § 201, conducted the public meeting pursuant to EDPL, § 203, and made a Determination and Findings as to the proposed project pursuant to EDPL, § 204, an impartial hearing was not held before an impartial arbitrator as to whether its property need be taken and, therefore, it was denied due process under the United States Constitution, Fourteenth Amendment. Petitioner concedes that EDPL, § 207 provides for a judicial review of the condemnor's Findings and Determinations as to whether a public use would be served by the proposed acquisition based upon the record made at the public hearing, but he contends that the judicial review is inadequate.

Facts and Prior Proceedings.*

The City of Plattsburgh instituted a proceeding under the Eminent Domain Procedure Law (EDPL) to acquire, for use as a public street, a private driveway owned by Terrace West, Inc. A public hearing was held as required by EDPL, Article 2, and thereafter the City Common Council made a Determination and Findings as to the public necessity for the project (A58). Terrace West, Inc. then challenged the City's Determination and Findings in the Appellate Division, Third Department. The Court confirmed the City's Determination and Findings (73 AD2d

*References are to pages of the petitioner's petition for certiorari.

763 [3d Dept, 1979]) and held that the taking was for a public purpose and dismissed the petition (A29).

Terrace West, Inc. thereafter made a motion for reargument to the Appellate Division which was denied (A26). Terrace West then appealed to the Court of Appeals. The Court of Appeals dismissed the appeal "upon the ground that no substantial constitutional question is directly involved" (49 NY2d 916 [1980]).

Terrace West did not seek certiorari to the United States Supreme Court but, instead, instituted an action in the Federal Court, Northern District. This action was dismissed pursuant to decision of the United States District Judge McCurn, holding that the issue having been decided by the Appellate Division and the Court of Appeals of the State of New York, the relitigation thereof was barred by the doctrines of *res judicata* and collateral estoppel (A15).

The City of Plattsburgh then commenced proceedings under Article 4 of the EDPL to acquire title to the property herein involved. This resulted in an order and judgment of the Supreme Court, Special Term, authorizing the filing of the acquisition map describing the property to be acquired by the City and vesting title thereto in it (A11).

The Appellate Division, Third Judicial Department, in 1982, affirmed the order permitting the City of Plattsburgh to file an acquisition map (____ AD2d ____, 499 NYS2d 343) (A8). Permission to appeal to the Court of Appeals was denied on September 8, 1982 (A1).

Statutes Involved.

The relevant United States constitutional provisions and State Statutes are attached hereto as Appendix A.

Reasons for Denying the Writ.

Terrace West, Inc. seeks a writ upon the grounds that Articles 2 and 4 of the Eminent Domain Procedure Law (EDPL) "are in violation of a landowner's, more specifically, in this instance, Terrace West, Inc.'s constitutionally guaranteed right to due process in actions involving a possible deprivation of property, under the Fourteenth Amendment." (16)

Petitioner contends, in essence, that the procedure provided in the EDPL for determination of the public necessity for a taking of private property is unconstitutional in that no formal adversary-type trial before a court is provided for, the issue being decided by the condemnor, after a public hearing, subject only to review by the courts based upon the record of the public hearing held. Neither case law, nor any other authority, is cited for such contention.

In *Zember v. State of New York,* 5 Misc 2d 216, 218 (Ct Cl, 1957), the court reviewed the theory of eminent domain and pointed out that a hearing is not needed:

> "The power of eminent domain is an inherent power in any sovereign. It is a characteristic and an attribute of sovereignty. Like the power of taxation and police power, the power of eminent domain exists as a necessity to effective government. The existence of the power does not depend upon constitutional provisions but rather, the power underlies the Constitution and exists simply because there is a sovereign power in existence. (*People v. Adirondack Ry. Co.,* 160 N. Y. 225, 236-237, affd. 176 U. S. 335.)

"The power has been exercised by the State of New York ever since the State came into existence yet such power was not even mentioned in the first Constitution of the State and under the present Constitution the power is referred to only by way of limitation on its exercise. In section 6 of article I of the Constitution the exercise of the power is limited by the restriction that no person may be deprived by his property without due process of law. In section 7 of article I of the Constitution the exercise of the power is limited by the restriction that private property may not be taken for public use without just compensation. In the exercise of the power of eminent domain due process in accordance with the constitutional guarantee does not grant to the property owner any right to be heard on the question of appropriation by the State unless some statute requires it. (*Matter of Village of Middletown*, 82 N. Y. 196, 201.) The right of the State to take possession of property and devote that property to public use in a summary manner without notice or hearing has long been sustained as not violating the constitutional requirements for due process of law. (*People v. Adirondack Ry. Co., supra*, pp. 238-241.)"

In *Brent v. Hoch*, 25 Misc 2d 1062 (Sup Ct, 1960), the court stated:

"The further objection that due process of law was wanting as no public hearing was held and no findings were made as to the taking is also insufficient. The right of eminent domain is inherent in the State; and the Federal and State Constitutions

merely require that the taking be for a public purpose and that there be the payment of just compensation in accordance with substantive and procedural due process of law. This means that after such taking the property owner shall be given reasonable notice and reasonable opportunity to be heard on the question of compensation and damages at some reasonable stage of the eminent domain proceeding. (*Bragg v. Weaver*, 251 U. S. 57, 62; *People v. Adirondack Ry. Co.*, 160 N. Y. 225, affd. 176 U. S. 335; 17 Carmody-Wait, New York Practice, § 8, pp. 151-152.) This requirement is satisfied by the hearing or trial on the issue of compensation and damages permitted in the Court of Claims, if no compromise as to the amount has been effected between the Commissioner and the owner (Mental Hygiene Law, § 46, subd. 13; Court of Claims Act, §§ 9, 10, 16, 20). Nor do the due process clauses require a public hearing or findings of fact when the State through a duly constituted State official exercises its right and power of eminent domain (*North Laramie Land Co. v. Hoffman*, 268 U. S. 276, 284, *supra; Bragg v. Weaver*, 251 U. S. 57, *supra; Matter of Public Serv. Comm.*, 217 N. Y. 61, 66, 67, *supra; People v. Adirondack Ry. Co.*, 160 N. Y. 225, affd 176 U. S. 335, *supra*)."

The law is well settled that, in eminent domain proceedings, there is no constitutional right to a trial on the issue of public necessity. *Fifth Ave. Coach Lines v. City of New York*, 11 NY2d 342, 348-349 (1962); *County of Orange v. Public Serv. Comm.*, 39 AD2d 311, 318-319 (2d Dept, 1972), affd 31 NY2d 843 (1973); *County of Broome v. Trustees of First Methodist Episcopal Church*, 37 AD2d 1036 (3d Dept, 1971).

In *County of Orange, supra,* the Court stated (39 AD2d at pp 318-319):

> "It is the general rule that *the question of need for a taking is for the Legislature, not the courts;* that the courts cannot review the legislative determination on that point, and notice and *a hearing on that question consequently are not essential to due process* (see, e.g., *Bragg v. Weaver,* 251 U. S. 57, 58-59, 62; *Rindge Co. v. County of Los Angeles,* 262 U. S. 700, 708-709; *People v. Smith,* 21 N. Y. 595, 597-598; *Matter of Townsend,* 39 N. Y. 171, 174; 1 Nichols, Eminent Domain [3d ed.], § 4.11, p. 540; 17 Carmody-Wait 2d, New York Practice, §108:13). Generally, it is only on the issues of fair compensation and public use for the taken property that property owners have a constitutional right to be heard, and *the right to notice and a hearing on the issue of need for the taking exists only if granted by statute* (see, e.g., *People v. Adirondack Ry. Co.,* 160 N. Y. 225, 238-239, affd. *sub nom Adirondack Ry. Co. v. New York State,* 176 U. S. 335; *Fifth Ave. Coach Lines v. City of New York,* 11 N. Y. 2d 342, 347-348; *Rindge Co. v. County of Los Angeles, supra; Bragg v. Weaver, supra; Matter of Townsend, supra; People v. Smith, supra*). In light of these general principles, then, property owners do not appear to have been deprived of any constitutional right when in 1970 the Legislature took away their previous statutory right to litigate, in the condemnation proceeding, the question of need for a taking for a utility transmission line." (Emphasis supplied.)

Articles 2 and 4 of the EDPL did not subject petitioner to an arbitrary exercise of the powers of government and

the State's authority was not exerted in excess of the petitioner's right to due process.

CONCLUSION.

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

Dated: Albany, New York
November 3, 1982

Respectfully submitted,

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APPENDIX A.

Constitutional Provisions and Statutes Involved.

United States Constitution, Fourteenth Amendment, Section 1:

> Section 1. Citizens of the United States.
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York Eminent Domain Procedure Law:

> §201. Public hearings
>
> Except as provided herein, prior to acquisition, the condemnor, in order to inform the public and to review the public use to be served by a proposed public project and the impact on the environment and residents of the locality where such project will be constructed, shall conduct a public hearing in accordance with the provisions of this article at a location reasonably accessible to the property owners whose property might be acquired for such project.

§202. Notice

(A) Where a public hearing is required by this article the condemnor shall give notice to the public of the purpose, time and location of its hearing setting forth the proposed location of the public project including any proposed alternate locations, at least ten but no more than thirty days prior to such public hearing by causing such notice to be published in at least five successive issues of an official daily newspaper if there is one designated in the locality where the project will be situated and in at least five successive issues of a daily newspaper of general circulation in such locality.

(B) In the event that the only newspaper available in such locality is a weekly publication the above described notice shall be published in such newspaper in at least two successive issues.

(C) Failure to notify a person or persons entitled to notice under this section shall not be jurisdictional nor construed to affect the validity of any title acquired by a condemnor under this law.

§203. Conduct of the public hearing

At the public hearing the condemnor shall outline the purpose, proposed location or alternate locations of the public project and any other information it considers pertinent, including maps and property descriptions of the property to be acquired and adjacent parcels. Thereafter, any person in attendance shall be given a reasonable opportunity to present an oral or written statement

and to submit other documents concerning the proposed public project. A record of the hearing shall be kept, including written statements submitted. The condemnor's copy of such record shall be available during normal business hours, at its principal and district offices to the public for examination without cost and shall be reproduced upon written request and payment of the cost thereof. Further adjourned hearings may be scheduled.

§204. Determination and findings

(A) The condemnor, within ninety days after the conclusion of the public hearings held pursuant to this article, shall make its determination and findings concerning the proposed public project and shall publish a brief synopsis of such determination and findings in at least two successive issues of an official newspaper if there is one designated in the locality where the project will be situated and in at least two successive issues of a newspaper of general circulation in such locality. The synopsis shall include those factors set forth in subdivision (B) herein, and shall also state that copies of the determination and findings will be forwarded upon written request without cost.

(B) The condemnor, in its determination and findings, shall specify, but shall not be limited to the following:

(1) the public use, benefit or purpose to be served by the proposed public project;

(2) the approximate location for the proposed public project and the reasons for the selection of that location;

(3) the general effect of the proposed project on the environment and residents of the locality;

(4) such other factors as it considers relevant.

§207. Judicial Review

(A) Any person or persons jointly or severally, aggrieved by the condemnor's determination and findings made pursuant to this article, may seek judicial review thereof by the appellate division of the supreme court, in the judicial department embracing the county wherein the proposed facility is located by the filing of a petition in such court within thirty days after the condemnor's completion of its publication of its determination and findings pursuant to section two hundred four herein. Such petition shall be accompanied by proof of service of a demand on the condemnor to file with said court a copy of a written transcript of the record of the proceeding before it, and a copy of its determination and findings. Upon receipt of such petition and demand, the condemnor shall forthwith deliver to the court a copy of the record and a copy of its determination and findings. The proceeding shall be heard on the record without requirement of reproduction. If such proposed public improvement is located in more than one judicial department such proceeding may be brought in any one, but only one of such departments and all such proceedings with relation to any single public project shall be consolidated with the first filed.

(B) The jurisdiction of the appellate division of the supreme court shall be exclusive and its judgment and order shall be final subject to review by

the court of appeals in the same manner and form and with the same effect as provided for appeals in a special proceeding. All such proceedings shall be heard and determined by the appellate division of the supreme court, and by the court of appeals, as expeditiously as possible and with lawful preference over other matters.

(C) The court shall either confirm or reject the condemnor's determination and findings. The scope of review shall be limited to whether:

(1) the proceeding was in conformity with the federal and state constitutions,

(2) the proposed acquisition is within the condemnor's statutory jurisdiction or authority,

(3) the condemnor's determination and findings were made in accordance with procedures set forth in this article, including, where applicable, a determination that an acquisition is exempt from compliance with this article, and

(4) a public use will be served by the proposed acquisition.

§402. Filing of acquisition maps; vesting

* * *

(B) In all acquisitions under supreme court jurisdiction provided in subdivision (B) of section five hundred one herein, the condemnor, prior to filing an acquisition map within the time prescribed

by section four hundred one, shall obtain an order to acquire such property and for permission to file such map by presentation of a verified petition to the supreme court in the judicial district where the real property to be acquired or any part thereof, is situated, in accordance with the following procedure:

(1) The condemnor shall cause to be filed in the office of the clerk of each county where the real property to be acquired or any part thereof is situated, a notice of the pendency of such proceeding. Such notice shall briefly state the object of the proceeding and shall contain a general description by metes and bounds or by section, block and lot number of the real property to be acquired thereby. It shall also state the names of such of the reputed condemnees of such real property as may be known to the condemnor, and in case any of the condemnees are unknown, a statement to that effect shall be made in such notice.

(2) The condemnor shall, at least twenty days prior to the return date of the petition, serve by registered or certified mail return receipt requested, a notice of the time, place and object of the proceeding upon the last known owner or owners of record of the property to be acquired, as the same appears from the record of the tax assessor of the district wherein such parcel or parcels are located. Said notice shall contain a copy of that portion of the proposed acquisition map affecting the owner's property. At least ten but not more than thirty days before the return date of the application, the condemnor shall also cause a copy of a diagram or

representation of the acquisition map showing the perimeters to be acquired and a notice generally describing the property to be acquired by metes and bounds or by section, block and lot numbers, to be advertised by publishing in at least ten successive issues of an official newspaper if there is one designated in the locality where the property is situated, and in at least ten successive issues of a newspaper of general circulation in such locality. In the event that the only newspaper available in such locality is a weekly publication the above described notice shall be published in such newspaper in at least three successive issues. Where the condemnor has conducted an article two public hearing or when the condemnor is exempt from compliance with article two pursuant to section two hundred six the condemnor may dispense with the requirement of publication in ten successive issues of a newspaper of general circulation. Where practicable, the condemnor shall cause copies of such notice in the form of handbills to be posted for the same period in at least three conspicuous places, upon or near such real property. The inadvertent failure to notify any condemnee, whether of record or not, will not invalidate any proceedings brought hereunder or any title acquired by the condemnor under this law.

(3) The condemnor shall present to the Court a petition verified by an authorized officer of the condemnor setting forth:

(a) a statement providing either the compliance with the requirements of article two of this law, including a copy of the condemnor's determination

and findings or a statement providing the basis of exemption from article two;

(b) a copy of the proposed acquisition map to be filed and the names and places of residence of the owners of the property to be acquired;

(c) a description of the real property to be acquired and its location, either by metes and bounds of each individual parcel, or section, block and lot number, and by reference to the acquisition map and notice of pendency attached to the petition;

(d) the public use for which the property is required;

(e) a request that the court direct entry of an order authorizing the filing of the acquisition map in the office of the appropriate county clerk or register and that upon such filing, title shall vest in the condemnor;

(f) if a non-governmental condemnor subject to the jurisdiction, supervision and regulation of the public service commission or the commissioner of transportation, it shall include in its petition for acquisition, notice that it shall deposit a bond or undertaking with the clerk of the court prior to vesting of title to the real property described in such petition in an amount to be fixed by the court on the return date of the petition. The court shall direct that the bond or undertaking will be applied in the amount necessary, for any default by the condemnor in the payment of all or part of the damages determined in the acquisition proceeding or the abandonment thereof.

The requirement for a bond or undertaking under this subdivision, may be waived by stipulation of the parties. If the amount deposited is insufficient to pay such damages and all costs and expenses awarded to a condemnee, judgment shall be entered against the condemnor for the deficiency, to be enforced and collected in the same manner as a judgment in the supreme court;

(g) if the property is to be used for the construction of a major utility transmission facility, as defined in section one hundred twenty of the public service law, or major steam electric generating facility as defined in section one hundred forty of such law with respect to which a certificate of environmental compatibility and public need has been issued under such law, a statement that such certificate relating to such property has been issued and is in force.

(4) Upon the presentation of the petition and notice with proof of service thereof, an owner of the property may appear and interpose a verified answer, which must contain specific denial of each material allegation of the petition controverted by him, or of any knowledge or information thereof, sufficient to form a belief, or a statement of new matter constituting a defense to the proceeding.

(5) At the time and place mentioned in such notice, unless the court shall adjourn the application to a subsequent date, and in that event at the time and place to which the same may be adjourned, upon due proof of service of notice and upon filing of such petition and proof to its satisfaction that

the procedural requirements of this law have been met, the court shall direct the immediate filing and entry of the order granting the petition, which order the condemnor shall file and enter together with the acquisition map, in the office of the county clerk or register in each county in which the real property or any part thereof is situated. Upon the filing of the order and the acquisition map, the acquisition of the property in such map shall be complete and title to such property shall then be vested in the condemnor.

* * *